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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

DALLAS SHANE CURLEE,

APPELLANT,

VS.

THE STATE OF TEXAS,

APPELLEE.

On Appeal from Trial Court Cause Number 18-1-10,036;
In the 24th Judicial District Court of Jackson County, Texas,
The Hon. Robert E. Bell, Judge Presiding.

DALLAS SHANE CURLEE'S BRIEF ON THE MERITS

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DALLAS SHANE CURLEE
October 30, 2020

ORAL ARGUMENT PERMITTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the parties to the suit are as follow:

APPELLANT:	**DALLAS SHANE CURLEE**
APPELLEE:	**THE STATE OF TEXAS**
TRIAL JUDGE	**HON. ROBERT E. BELL**
STATE'S ATTY AT TRIAL:	**HON. PAM GUENTHER** **HON. THOMAS J. DILLARD** Assistant District Attorney Jackson Co. District Attorney's Office 115 W. Main, Suite 205 Edna, Texas 77957
DEFENSE ATTY AT TRIAL:	**HON. JOHN C. EVANS** P.O. Box 503 Hallettsville, Texas 77964
APPELLATE STATE'S ATTY:	**HON. DOUGLAS K. NORMAN** Special Prosecutor for Jackson Co. District Attorney's Office 115 W. Main, Suite 205 Edna, Texas 77957
APPELLATE DEFENSE ATTY:	**HON. LUIS A. MARTINEZ** P.O. Box 410 Victoria, Texas 77902

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PD-0624-20

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DALLAS SHANE CURLEE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, **DALLAS SHANE CURLEE,** Appellant in this matter and respectfully submits this BRIEF ON THE MERITS arising from the judgment and decision of the 13th Judicial District Court of Appeals affirming the conviction and sentence imposed in the trial court after a jury convicted him of the offense of "Possession of a Controlled Substance, in a drug free zone."

This appeal originally arises from the 24th Judicial District Court of Jackson

County, Texas, the Honorable Robert E. Bell, Judge Presiding, in District Court Cause Number 18-1-10,036, in which DALLAS SHANE CURLEE was the Defendant and the STATE OF TEXAS was the Plaintiff.

I.

STATEMENT OF THE CASE

Appellant was charged by indictment as follows: "intentionally and knowingly possessing a controlled substance, to wit: Methamphetamine, in an amount by aggregate weight of more than 1 gram but less than 4 grams and said offense occurred in, on or within 1000 feet of a playground to wit: First United Methodist Church, 216 W. Main Street, Edna, Jackson County, Texas." [CR-4].

On, or about, April 22, 2019, Appellant's jury trial began. On, or about April 24, 2019, the jury found Appellant "guilty" of the offense as charged in the indictment in this matter and found Special Issue No. 1 in the affirmative [CR-112-113; 120-123; RR-V-54]. On the same day, the jury assessed Appellant's punishment as imprisonment in the Institutional Division of the Texas Department of Criminal Justice for twenty (20) years, and costs of court. [CR-118; 120-123; RR-V -119-121]. Appellant appealed. [CR-126].

The Honorable 13th Court of Appeals issued an opinion on, or about, April 30, 2020, affirming Appellant's conviction and sentence. Appellant timely filed his Motion for Rehearing and asked that the 13th Court of Appeals analyze and

opine on the Drug Free Zone enhancement issue raised in his briefing and that. that the opinion be published.

After requesting and receiving briefing from the State, the 13th Court of Appeals granted in part and denied in part Appellant's Motion for Rehearing, on, or about June 11, 2020. The Honorable 13th Court of Appeals' June 11, 2020, did not address the "open to the public" issue any further than the April 30, 2020 opinion did, and ordered the June 11, 2020, be published.

Appellant timely filed his Petition for Discretionary Review following the disposition by the 13th Court of Appeals of his Motion for Rehearing. This Honorable Court of Criminal Appeals granted Appellant's Petition for Discretionary Review as to all three grounds cited within on, or about, September 30, 2020.

II.

STATEMENT REGARDING ORAL ARGUMENT

This Honorable Court of Criminal Appeals has permitted oral argument in this cause. Appellant relies upon the previous reasoning for the request for oral argument made in his Petition for Discretionary Review.

III.

GROUNDS GRANTED FOR REVIEW AND PRESENTED

In accordance with Rule 68.4 of the Texas Rules of Appellate Procedure,

Appellant presents the following grounds for review:

GROUND FOR REVIEW NUMBER ONE:

> **Under the Drug Free Zone statute, is an area with play equipment presumed to be "open to the public" freeing the State from having to produce legally sufficient evidence at trial?**

GROUND FOR REVIEW NUMBER TWO:

> **Did the 13th Court of Appeals err by improperly analyzing the record for legally sufficient evidence proving that the "playground" was "open to the public" under the Drug Free Zone statute?**

GROUND FOR REVIEW NUMBER THREE:

> **Did the 13th Court of Appeals err in finding that the area where it was alleged that Appellant possessed drugs was a "playground" as defined by the Drug Free Zone statute?**

IV.

STATEMENT OF THE FACTS

Testimony of Hillary Hammond

Hillary Hammond, a friend of Appellant for about 15-20 years testified for the defense at trial. [RR-IV-172].

Ms. Hammond testified that she and Appellant had gone to a few places the day of the incident and ended up at the jail because she wanted to visit someone there. [RR-IV-173]. She parked her van in front of the courthouse. *Id.*

Testimony of Sgt. Dave Thedford

Sgt. Dave Thedford, a jail supervisor with the Jackson County Jail, was called by the State to testify. [RR-IV-14].

Sgt. Thedford testified that he was working at the Jackson County Jail on December 7, 2017 at 1:30 in the afternoon. [RR-IV-15]. Sgt. Thedford recounted that he had answered the intercom for Ms. Hillary Hammond; she was there to visit with her incarcerated boyfriend, Anthony Havens. [RR-IV-16].

Sgt. Thedford related next that Ms. Hammond came into the jail for her visit and was in possession of a plastic bag. While Ms. Hammond was being checked into the jail, Sgt. Thedford looked through the bag. [RR-IV-18]. Inside of some contact lens boxes in the plastic bag, Sgt. Thedford found four razor style blades such as those used in box cutters. Sgt. Thedford took the blades to his captain. [RR-IV-18].

Testimony of Gary Smejkal

At the time of the incident made the basis of this cause, Gary Smejkal was an investigator with the Jackson County Sheriff's Office. [RR-IV-38, 41].

On December 7, 2017, Inv. Smejkal came into contact with Appellant. [RR-IV-41]. Initially, Inv. Smejkal had been contacted by the chief deputy, Rick Boone, that someone [Hillary Hammond] had come into the jail facility to visit a trustee inmate and had been found to be in possession of razor blades located in a

contact lens box. [RR-IV-42]. Ms. Hammond had been arrested and the chief deputy asked Inv. Smejkal to do a follow-up interview with her. [RR-IV-42]. In order to verify an explanation for the razor blades, Inv. Smejkal asked Ms. Hammond if he could go and check her van to look for a receipt. [RR-IV-46].

Inv. Smejkal testified that he and Cpt. Omecinski (also of the Jackson County Sheriff's Office) escorted Ms. Hammond to her van. As Ms. Hammond was in custody, Inv. Smejkal had the keys to the van. [RR-IV-46]. At one point en route, Ms. Hammond asked if her van could be released to a friend who was in the van waiting for her jail visit to end. [RR-IV-47]. Inv. Smejkal testified that Appellant was inside a van that was parked near the sidewalk that citizens use to come into the courthouse. [RR-IV-42]. He later testified that the van was parked on the roadway, one space over from the main sidewalk going to the street on West Main Street outside of the courthouse. [RR-IV-46].

When they got to the van, it was locked. [RR-IV-51]. Inv. Smejkal unlocked the door and Ms. Hammond opened it. [RR-IV-51]. When Inv. Smejkal first observed Appellant, Appellant was sitting up. Inv. Smejkal asked him who he was and Appellant replied. Inv. Smejkal asked Appellant for identification and "he climbed, walked in between the two coach seats and sat in the driver's seat." [RR-IV-53]. Inv. Smejkal obtained a driver's license from Appellant. After running the driver's license, it was determined that Appellant had an active warrant and the

van could not be released to him. [RR-IV-56-57]. Inv. Smejkal related that there was no one else at the scene to release Ms. Hammond's van to. [RR-IV-58].

Inv. Smejkal conducted an inventory search and Appellant and Ms. Hammond were returned to the jail. [RR-IV-60]. During the search of the van, Inv. Smejkal found a baseball cap. Inside the cap, a package of Marlboro cigarettes was found. Inside of the Marlboro box, Ziploc bags were found. Inside of the Ziploc bags, crystal methamphetamine was found. [RR-IV-63]. The cap also had a Samsung cell phone in it, as well as a propane torch lighter, glass pipe and a syringe. [RR-IV-66]. A folding pocketknife and a scratch off lottery ticket were also found in the cap according to Inv. Smekjal's testimony. [RR-IV-67-68]. Inv. Smejkal's search of the van also revealed a brown purse that was located between the two coach bucket seats inside the van. The purse was found to contain almost a gram of methamphetamine. The purse also contained currency, empty Ziploc bags, and a glass pipe. [RR-IV-68-69].

Inv. Smejkal further related that the van was parked in close proximity to a church "playground" at the First United Methodist Church. [RR-IV-74]. Smejkal

later testified that the Methodist Church playground was 547.38 feet from the van. [RR-IV-88].[1]

Describing the playground, Inv. Smejkal agreed with the State that the playground was outdoors and intended for recreation. [RR-IV-88]. Inv. Smejkal testified that the playground had three or more play stations intended for children to use, including two slides, climbing bars, a ladder, a swing set and a playhouse. [RR-IV-88]. Inv. Smejkal was asked if the area was open to the public or not; he testified that the playground was open to the public. *Id.* He further testified that the playground is fenced off by a chain-link fence. [RR-IV-88]. The chain-link fence is about four feet high When Inv. Smejkal speculated that the fence was intended to keep balls inside the playground rather than designed to keep people out, Appellant's counsel objected to the speculation; the Trial Court sustained Appellant's objection. [RR-IV-89]. Inv. Smejkal also assumed that since there were no locks on the gates, the fence was not intended to keep people out. [RR-IV-89]. Inv. Smejkal later conceded that he was not aware whether the fence gates were unlocked in December of 2017. [RR-IV-102]. He further conceded that he had not gone to check whether the fence was unlocked in December 7, 2017, the date of the incident made the basis of this cause. [RR-IV-102]. Inv. Smejkal

[1] Inv. Smejkal later testified that using a measurement wheel, he had determined the distance from where the van been parked to the playground to be 539.2 feet and agreed with the State that the distance was less than 1000 feet. [RR-IV-157].

further testified that on his visit to the area at the church referred to as a playground, he was accompanied by the pastor of the church and that he had only gone through one of the gates. Inv. Smejkal further conceded that he had never attempted to go to the playground during an "off-hour from church." [RR-IV-103]. Although Smejkal attempted to support his belief that the fence gates were always unlocked with a hearsay statement from the pastor of the church, the pastor's statement was objected to by Appellant's trial attorney and sustained by the Trial Court. [RR-IV-102].

After he testified during Appellant's trial, Inv. Smejkal went back to the playground and church during a break in the proceedings. He returned to testify about his observations made during the break. During this testimony, it was revealed to the jury that there was in fact different methods to lock the gates surrounding the "playground." In one instance, referring to State's Exhibit 37, Smejkal testified that there was a single cylinder dead bolt lock on that fence gate. [RR-IV-160]. This particular gate was locked and required Inv. Smejkal to reach in and open it to gain access. With reference to State's Exhibit 38, Smejkal revealed that he also found a gate that was locked with a padlock. [RR-IV-161]. When Inv. Smejkal took the photograph admitted as State's Exhibit 38, he was actually standing inside the playground. *Id.*

V.

SUMMARY OF THE ARGUMENT

The State ***must*** adduce legally sufficient evidence to support all parts of the definition of "playground" for purposes of sufficiently supporting a Drug Free Zone enhancement. This Honorable Court of Criminal Appeals should follow the conclusion reached in *Ingram,* that there is no presumption for the "open to the public" part of the applicable statute. There being no presumption that an area with play equipment is "open to the public" and thus a "playground," the State bears the responsibility of proving by legally sufficient evidence that an area with play equipment is also "open to the public" before it can be deemed a "playground" for purposes of Texas Health and Safety Code §481.134

The Hon. 13th Court of Appeals' decision in this appeal concluded that the drug free zone allegation in Appellant's case was sufficiently proven by evidence of distance, fencing and play equipment. Evidence of distance and play equipment does not assist in determining whether an area alleged to be a playground is "open to the public." The 13th Court of Appeals' analysis made the evidence of fencing dispositive of the issue "open to the public" in this appeal. Again, Appellant requests that this Court should adopt the *Ingram* court's position that the presence of fencing, or lack thereof, is not dispositive.

The bedrock question before this Honorable Court is: "Is this area open to the public?" The answer in cases such as this one, and many others, is, "It's complicated." To discern whether an area with play equipment is a "playground," the facts adduced at trial must include evidence from a qualified, competent witness who owns the property, or can competently speak for the owner, that show the jury that the area is intended to be open to the public, is indeed open to the public by virtue of public ownership, and if so, whether there are any exceptions or limitations for the public's use of an area that is "open to the public." It would appear that both the *Ingram* and *Graves* courts were leading to this in their opinions, seeming to recognize that that you can not judge a place a "playground" simply by the presence of play equipment.

VI.

ARGUMENT

GROUND FOR REVIEW NUMBER ONE RESTATED:

> **Under the Drug Free Zone statute, is an area with play equipment presumed to be "open to the public" freeing the State from having to produce legally sufficient evidence at trial?**

The Drug Free Zone statute does not presume that an area with play equipment is "open to the public." Texas Health and Safety Code §481.134 does not include any presumption, or rebuttable presumption, regarding "open to the public." *See* TEX. HEALTH & SAFETY CODE §481.134 *et. seq*. The Texarkana Court

of Appeals has found that there is no presumption with respect to "open to the public." *Ingram v. State*, 213 S.W.3d 515, 518-520 (Tex. App.—Texarkana 2007, no pet.). Neither the 13th Court of Appeals decision in this case, nor the *Graves* decision of the 14th District Court of Appeals seem to contradict *Ingram* on this point. *See Dallas Shane Curlee v. State of Texas*, No. 13-19-00237-CR, page 7, (Tex. App.—Corpus Christi, June 11, 2020)(ordered published; *Graves v. State*, 557 S.W.3d 863, 866 (Tex. App.—Houston [14th Dist.] 2018, no pet.)). Moreover, review of the statute clearly shows that an area with play equipment is potentially a "playground," but ***only if*** the area is also "open to the public." Further review of the text and construction of the statute at issue makes this clear.

The Texas Controlled Substances Act, in §481.134 *et. seq*., provides for an enhancement if, among other places, a person commits an offense within 1000 feet of a "playground." The enhancement affects the punishment ranges, minimum sentences and maximum fines that apply to drug offenses found in the Texas Controlled Substance Act, as well as limits concurrent sentencing with other punishments. *See* TEX. HEALTH & SAFETY CODE §481.134(b-f); (h). Further, the Drug Free Zone enhancement affects parole eligibility. *See* TEX. GOV'T CODE §508.145(e).

In §481.134(a)(3), "playground" is defined as follows:

> "Playground" means any outdoor facility that is not on the premises of a school and that:
>
> (A) is intended for recreation;
>
> (B) is open to the public; and
>
> (C) contains three or more play stations intended for the recreation of children, such as slides, swing sets, and teeterboards.

See TEX. HEALTH & SAFETY CODE §481.134(a)(3).

When interpreting a statute, an appellate court must look to the literal text of the statute for its meaning, and must ordinarily give effect to that plain meaning, unless application of the statute's plain language would lead to absurd consequences that the Legislature could not possibly have intended, or if the plain language is ambiguous. *Badgett v. State*, 42 S.W.3d 136, 138 (Tex. Crim. App. 2001)(*citing Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App. 1991). One of the cardinal rules of statutory construction, as observed by the *Badgett* court, is that "statutes are to be construed, if at all possible, so as to give effect to all of its parts, and so that no part is to be construed as void or redundant." *Badgett v. State*, 42 S.W.3d 136, 139 (Tex. Crim. App. 2001).

It appears from the plain text of the definition of "playground" that all the requirements should be met, including §481.134(a)(3)(B) which reads: "is open to the public; ***and***…." *See* TEX. HEALTH & SAFETY CODE §481.134(a)(3)(*emphasis*

added). The plain reading of the statute and the inclusion of "and" suggests that all three parts of the definition must be met to prove that an area is a "playground," rather than each individual part supporting the finding of "playground," in and of itself. TEX. HEALTH & SAFETY CODE §481.134(a)(3) It should be presumed that the Texas Legislature knew the effect of adding the "and" to the definition rather than an "or," and intended for the each of the sections in (A),(B), and (C) to be met and proven.

The statute and the definition of "playground" are not vague or ambiguous. *See* TEX. HEALTH & SAFETY CODE §481.134(a)(3). §481.134(a)(3) clearly establishes that part of proving that an area is a "playground" for purposes of the enhancement includes "open to the public." To suggest that the State does not need to prove the "open to the public" part of the definition of "playground" would render that part of definition found in §481.134(a)(3) void, offending one of the cardinal rules of statutory construction. *See* TEX. HEALTH & SAFETY CODE §481.134(a)(3); *cf. Badgett v. State*, 42 S.W.3d 136, 139 (Tex. Crim. App. 2001).

Another consideration is whether application of the statute's plain language would mean the statute would lead to absurd results. To the contrary, without the "open to the public" portion of the definition the use of the statute and "playground" would result in absurd results. For example, any place outdoors that is not a school with play equipment intended for children to play on becomes a

"drug free zone playground." This would mean the person who puts play equipment in his back yard for his kids to play with becomes a "playground" for purposes of Texas Health and Safety Code §481.134 *et seq*. Without the "open to the public" portion of the definition of "playground," any privately owned place that puts out play equipment can also be a "playground." For example, a privately owned country club, that is a members only club, can become a "playground" just for adding the requisite number of children's play equipment on its property.

This ground for review is simple to answer. The Texas Legislature defined what a playground is and no part of it should be ignored. Proof is therefore necessary at trial. The tenets of statutory construction and the definitions contained in Texas Health and Safety Code §481.134 *et seq* clearly support this answer. Put simply, there is no presumption that can be made for any of the parts of the definition at issue in this appeal, least of all, "open to the public." As such, the State bears the burden of proof beyond a reasonable doubt.

GROUND FOR REVIEW NUMBER TWO RESTATED:

> **Did the 13th Court of Appeals err by improperly analyzing the record for legally sufficient evidence proving that the "playground" was "open to the public" under the Drug Free Zone statute?**

The 13th Court of Appeals conclusion that the area at the First United Methodist Church was a "playground" is not supported by the record in this case. The question before them is the same as before this Honorable Court: was the area

alleged by the State at trial as a "playground" proven to be "open to the public." The 13th Court of Appeals provided the following reasoning and finding in both the April and June opinions:

> "According to Smejkal's trial testimony, there was a church playground one block from where Hammond's van was parked and across the street. According to Google Maps, the distance was 547.38 feet from Hammond's van. Smejkal also measured the distance of 539.2 feet from Hammond's parking space to the middle of the playground with a rolling tape-measure he borrowed from the City of Edna. He did not calibrate the rolling tape and could not testify to its accuracy. Smejkal personally confirmed that none of the various gates to the playground were locked except one.
>
> The photographs in evidence demonstrate a large play area with two slides, a playscape, a tube, and monkey bars. The large grassy area that surrounds that playground is fenced with multiple entrances, only one of which is capable of being locked. Both measurements of the distance between where Hammond's van was parked and where the playground is located, one-and-a-half blocks away, equated to less than 550 feet. The standard for finding the distance to be a drug-free zone is within 1000 feet. The jury's answer is supported by legally sufficient evidence."

Dallas Shane Curlee v. State of Texas, No. 13-19-00237-CR, pages 7-8, (Tex. App.—Corpus Christi, June 11, 2020)(ordered published). Whether or not the State proved the other definitional elements of "playground" does not weigh in favor of finding that the area was also "open to the public" and thus a "playground."

The 13th Court pointed to three distinct categories of proof in arriving at a

decision that the jury's answer was supported by legally sufficient evidence: distance, fencing, and the presence of play equipment. Any evidence in the first and third categories does not prove that the area is "open to the public." Evidence of distance may prove another part of the enhancement statute, ("within 1,000 feet"), but it does not prove or disprove that the area is "open to the public." The same is to be said of evidence of play equipment at the area. The evidence cited by the 13th Court of Appeals might be proof of part of the definition in §481.134(a)(3) concerning intention for recreation and number of playsets, but it does not prove or disprove whether the area is also "open to the public."

The only evidence cited by the 13th Court of Appeals addressing the "open to the public" issue at all is to point to the reference to the fencing and the ability for the fencing to be locked. The 13th Court of Appeals reliance on evidence of fencing is misplaced and should not be dispositive on this issue.

Specifically referring to fencing when addressing a similar challenge to "open to the public" in the context of a drug free zone enhancement case, the Texarkana Court of Appeals wrote: "We note that city-owned public playgrounds are often fenced, but are in fact open for public use, and ***do not agree that fencing or the lack thereof would be dispositive.***" *Ingram v. State*, 213 S.W.3d 515, 518 (Tex. App.--Texarkana 2007)(emphasis added). Although this might seem contrary to Appellant's position at first blush, it actually illustrates Appellant's

contention that fencing is not dispositive. Without more, from a qualified and competent witness or documentary evidence to provide context, for example, it cannot be assumed what a fence might mean with respect to whether a place is "open to the public." Just as one cannot assume an area is a playground according to the applicable statute because it meets some of the requirements (i.e. requisite amount of play equipment), one also cannot assume that fencing is an indication of whether an area is "open to the public." As the *Ingram* court pointed out, fencing is not entirely dispositive. In this case, even if considered, the existence of fencing in this case makes it unreasonable to infer that the church play area at the First United Methodist Church is open to the public. In this case, the area in question is contained within fencing. The clear inference is that the fencing at the First United Methodist Church means to keep people out for the security of the church's members. Most reasonable people do not see a fence as an invitation to "come in;" it is more reasonable to believe that a fence says "keep out." Although Inv. Smejkal speculated that the four-foot fence around the play area was to keep balls from bouncing out of the play area, it is more reasonable to infer that the fence keeps people out. Moreover, it is not reasonable to accept Smejkal's belief since a fence does not need to be locked in order to keep balls from leaving the play area. A closed gate, even unlocked, would accomplish Smejkal's reason for the fence. Locked gates keep people outside, not balls inside. More importantly, while the

ability to lock a fence gate is one thing; securing the fence gates sends another clear and reasonable inference. In this case, Smejkal testified that locks, both bolt and padlock, were employed on the fencing at the First United Methodist Church when he visited.

If common knowledge, observation and experience gained in ordinary affairs is to be considered, gates, fences and locks mean one thing: not everyone is welcome. Mere accessibility, or the ability to access an area that is fenced is not a public invitation. If the opposite were true, a trespasser could argue that some area was "open to the public" because of the ease with which he could get around the gates or other security apparatus intended to keep people out. As Appellant argued previously on appeal in this case, Appellant asks this Court of Criminal Appeals to consider the following: if parents put play equipment in their *unfenced* back yard, is that also a "playground" that is "open to the public?" Appellant believes this is not the case. Fencing, or lack thereof, ability to access or not access a place, easily or with difficulty does not determine whether a place is "open to the public." Consider again, the homeowner who puts playground equipment for his/her children to use in his/her unfenced backyard. It might be neighborly to let anyone trespass upon his/her property to use his children's swingset. Nice or not, it is not reasonable for anyone to infer that the homeowner has made his backyard "open to the public."

Put simply, the only evidence cited by the 13th Court of Appeals to support its ultimate conclusion related to the fencing. Fencing, or the lack thereof, is not and should not be dispositive for determining whether a place is "open to the public" for purposes of the Drug Free Zone statute. The 13th Court of Appeals erred in its analysis of the record of this case.

GROUND FOR REVIEW NUMBER THREE RESTATED:

Did the 13th Court of Appeals err in finding that the area where it was alleged that Appellant possessed drugs was a "playground" as defined by the Drug Free Zone statute?

There appears to be little precedent in Texas jurisprudence for how an appellate court in Texas should analyze this issue *in this particular context* and what facts must be shown to sustain the State's burden. Both Appellant and the State were only able to point to two published cases that seemed to reflect the issue raised in this appeal. Both Appellant and the State addressed both of them in their respective briefing in this case. Neither Appellant, nor the State, cited any authority from the Court of Criminal Appeals, nor was any cited in the opinion issuing from the Honorable 13th Court of Appeals.

Appellant believes that *Ingram*, is instructive for the resolution of this case. The Texarkana Court of Appeals noted in support of its decision:

> The question is actually whether the jury could reasonably infer from the evidence before it the facility was public in nature. The ownership of the park by an

> alumni association, generally a private organization, does not assist in the determination that the park is open to the public. The fact that a baseball field was on the property adds little, as there is likewise no proof that it is open to use by the public. The fact the property was located near a residential area and contained playground equipment shows no more than that some children may use the facility — not that the public at large had access or permission to use the property. It is not uncommon for a group of home-owners in a neighborhood to provide a playground and limit its use to the children living in the neighborhood.
>
> This record contains nothing else that supports the conclusion the outdoor recreational facility was open to the public. The statute contains no presumption in that regard, and we cannot assume from the evidence provided, or from any reasonable inferences raised from that evidence, that the facility was one that was open to the public.

Ingram v. State, 213 S.W.3d 515, 518-19 (Tex. App.--Texarkana 2007). Between *Ingram* and this case, the similarities are easy to see. The record in this case contains no evidence that the church or its adjacent areas were on public land. Similarly, there was no evidence or testimony that the First United Methodist Church is a public institution. There was also no evidence that the "playground" was intended to be used by any and all members of the public or passersby, rather than for the benefit of its church membership. Assuming *arguendo* that the fencing being capable or incapable of being locked is relevant to the analysis in this case, the evidence at trial still does not justify the conclusion that the area is "open to the

public." Just because it is possible that the public could potentially gain access to the area in question through an unlocked portion of the fencing, does not establish that it is indeed "open to the public."

So, how should a Court of Appeals in Texas and this Court weigh the sufficiency of evidence proving that an area is "open to the public" in the context of drug free zone enhancement in this case? Both *Ingram* and *Graves* provide a good basis to start. Both cases seem to be looking for the same thing in their records: whether the jury could reasonably infer from the evidence before it that the facility was public in nature. There are longstanding principles of analysis for legal sufficiency that already exist and are echoed in both decisions. These echoes sound from the following well established standards for reviewing legal sufficiency. The State must prove each element of an offense beyond a reasonable doubt, and the evidence supporting the sufficiency of the evidence must be contained in the record. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Brooks v. State*, 323 S.W.3d 893, 911-912 (Tex. Crim. App. 2003); *cf. Hernandez v. State*, 116 S.W.3d 26, 31 (Tex. Crim. App. 2003). An appellate court's rigorous legal sufficiency review focuses on the quality of the evidence presented. *Brooks v. State,* 323 S.W.3d 893, 917-18 (Tex. Crim. App. 2010). The standards for reviewing legal sufficiency recognize "the trier of fact's role as the sole judge of the weight and credibility of the evidence after drawing reasonable inferences from

the evidence." *Adames v. State* , 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). While there is clear deference given to a jury's role as factfinder, juries are ***not permitted*** to come to conclusions based on "mere speculation or factually unsupported inferences or presumptions." *Hooper v. State* , 214 S.W.3d 9, 15-16 (Tex. Crim. App. 2007)(emphasis added). Speculation is "theorizing or guessing about the possible meaning of facts and evidence presented." *Id.*

Bearing the foregoing in mind, the answer to whether a place is "open to the public" is often: "It's complicated." That is because some places can be open to the pubic in some respects and not in others. Sometimes a place is open to the public at some times, but not others. Sometimes a place is open to the public, but still other places within that area are not. Nonetheless, evidence describing the public nature of an area and providing the jury with evidence that they can make determinations without speculating are all that is required to allow a jury to make a decision based upon legally sufficient evidence. While it may be "complicated," to say out of hand whether a place is "open to the public," it is not impossible, nor tedious, nor difficult to prove that such is true.

Notwithstanding the many things that are not present in this record to support an affirmative finding of "open to the public," Appellant will focus on what is contained within the record. Appellant has already addressed the fencing evidence. Appellant addresses what remains in this case that the State could try to

rely upon to defend the jury's decision.

Inv. Smejkal was asked if the area at the First United Methodist Church was open to the public. Inv. Smejkal said that it was. [RR-IV-88]. It is important to note at the forefront that Inv. Smejkal's statement was not relied upon by the 13th Court of Appeals as reasoning for finding the area was "open to the public" was proven by legally sufficient evidence as laid out in the published opinion. The State has not argued that this statement is a basis for establishing legal sufficiency for the area being deemed "open to the public." Appellant will not speculate why, but will explain why the statement does not provide a legally sufficient basis for proving that the area in question is "open to the public."

First, the statement is entirely conclusory. The conclusory nature of his statement is revealed by the lack of evidence adduced to support his assertion at trial. Further "open to the public" is a legal conclusion and a legal term of art, not a phrase thrown around in everyday parlance. Inv. Smejkal was also not qualified to make the statement because "open to the public" is a legal conclusion that ultimately must be based upon facts. Inv. Smekjal was not shown to have any personal knowledge of whether the area in question was, based upon evidentiary facts, "open to the public." The record reveals no basis for him to make the conclusion at all. Based upon the bulk of his testimony, he was most concerned with the fencing around the area at the First United Methodist Church. Inv.

Smejkal was not shown to be a member of the church, nor did his investigation reveal anything about the ownership of the church itself. This is certainly not evidence to support a finding beyond a reasonable doubt that the area at the First United Methodist Church with play equipment is "open to the public."

If Inv. Smejkal's statement was not based upon proven facts rather than subjective feelings or "hunches," then his statement was not only conclusory, but also based upon speculation. If the jurors in Appellant's case were not able to speculate, how can they base their verdict upon conclusory speculation? *See Hooper v. State* , 214 S.W.3d 9, 15-16 (Tex. Crim. App. 20070. Further, this type of evidence cannot be the kind of "quality" evidence that is contemplated during a legal sufficiency review to uphold a verdict. *Brooks v. State,* 323 S.W.3d 893, 917-18 (Tex. Crim. App. 2010). Even considering Smejkal's testimony, it would still only be a modicum of evidence, which is still insufficient. *Britain v. State*, 412 S.W.3d 518 (Tex. Crim. App. 2013).

Appellant acknowledges that direct evidence is not the only way to prove that a place is "open to the public" in the context of this issue. As such, this Honorable Court must also consider whether the jury in this case could reasonably infer from other evidence that the play area located on the church grounds was "open to the public." The record in this case again fails in this regard to support the finding that the play area was "open to the public." The State's evidence

regarding the element of "open to the public," really focuses on "accessibility" vs. "permission for the public's use." Put simply, just because people can access something does not mean that any member of the public may do so, has permission to do so, or is invited to do so. The reasonable inferences and conclusions from review of the facts in the record of this case establish that the play area at the First United Methodist Church is NOT open to the public. A reasonable inference is that they play area exists for the benefit of the church member's children and visitors to the church. In the alternative, the facts conclusively establish that there is a reasonable doubt. When viewed in concert, the facts are insufficient to support the jury's finding in this case. *Britain v. State*, 412 S.W.3d 518 (Tex. Crim. App. 2013).

It is also a reasonable conclusion that an area on the grounds of a private religious institution or facility is not "open to the public." Amenities located on the grounds of a religious institution are not like a public park provided by the government for the benefit and use of the greater public. Just because the public can gain access to the playground equipment does not mean that an open invitation to use the property has been made to the public.

Put simply, the 13th Court of Appeals erred in finding that the area in question in this appeal was a "playground" because there was no proper evidence, either direct or indirect, or that could provide a reasonable inference that the area

located at the First United Methodist Church with play equipment was "open to the public."

VII.

CONCLUSION AND PRAYER

WHEREFORE, for the reasons set forth above, Appellant submits that the 13th Court of Appeals erred in affirming Appellant's conviction. Appellant respectfully prays that this Honorable Court reverse and render the decision in this matter, or reverse and remand this case to the 13th Court of Appeals for further proceedings, and/or to reverse and directly remand Appellant's case to the Trial Court for a new trial on guilt innocence. Appellant further prays for general relief, and any other relief he is entitled to in law or in equity.

Respectfully Submitted,

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VIII.

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned, Luis A. Martinez, I hereby certify that the number of words in the above Appellant's Brief on the Merits, excluding those matters listed in Rule 9.4(i)(3), is 6,249 words.

Luis A. Martinez

IX.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document was served upon the persons below in the manner indicated on this 30th day of October, 2020, pursuant to the Texas Rules of Appellate Procedure.

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